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In the Supreme Court

OF THE

United States

OCTOBER TERM 1992

CITY OF VERNON,
Petitioner,
vs.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Does a vertically integrated electric utility with monopoly power in all relevant markets that denied a city (its wholesale customer and competitor) reasonable access to its transmission system (concededly essential to competition in the relevant markets) have a valid business justification defense to the city's Sherman Act Section 2 claim (15 U.S.C. § 2) on the ground that permitting the city to compete with it for wholesale power could adversely affect the utility's prices to its retail customers?

2. When a city has proved its *prima facie* case of Section 2 liability against an electric utility that denied the city access to transmission, can summary judgment against the city be sustained on the ground that pro rata sharing of the facility, assumed in the city's damage study, is unreasonable as a matter of law thereby destroying the city's proof of any damages?

LIST OF PARTIES

The parties to the proceedings in the Central District of California and the United States Court of Appeals for the Ninth Circuit were Petitioner City of Vernon, Plaintiff, and Respondent Southern California Edison Company, Defendant below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner City of Vernon ("Vernon") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed February 7, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix ("App." concurrently filed herewith) at pages 23 *et seq.* The order of the Court of Appeals denying Vernon's petition for rehearing and suggestion for en banc consideration is printed in App. at page 24. The findings of fact and conclusions of law filed by the District Court for the Central District of California are printed in App. at pages 25 *et seq.* The judgment of the district court is printed in App. at page 49. The district court's order denying Vernon's motion for reconsideration is printed in App. at page 50.

JURISDICTION

The jurisdiction of the district court was invoked pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. The judgment of the United States Court of Appeals for the Ninth Circuit was filed February 7, 1992. The order of the Court of Appeals denying Vernon's petition for rehearing and suggestion for rehearing en banc was filed on April 21, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, in pertinent part provides:

> "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ."

Section 14 of the Clayton Act, 15 U.S.C § 15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . ., and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ."

STATEMENT OF THE CASE

Litigation History. Petitioner Vernon, an industrial city in the Los Angeles Basin that buys wholesale power for resale to its retail customers, filed its amended complaint on August 7, 1987, charging Southern California Edison Company ("Edison"), a major electric utility company, with violations of Sections 1[1] and 2 of the Sherman Act, 15 U.S.C. §§ (1), (2), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Vernon's Section 2 claim was based on Edison's refusal to permit Vernon reasonable

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[1]Vernon's Section 1 claims charged Edison with a horizontal combination with its wholesale competitor preventing Vernon from buying wholesale power from Nevada Power Company and Edison's conspiracy with others to prevent Vernon from obtaining any transmission on the power line to the Pacific Northwest (Pacific Intertie) for anticompetitive purposes. Vernon does not seek review of the Court of Appeals' disposition of its Section 1 claims.

access to its essential transmission facilities thereby foreclosing Vernon (its wholesale customer and competitor) from competing with Edison in the relevant markets with the intent to maintain and extend its admitted monopoly power in those markets. Vernon sought damages for its antitrust injury and injunctive relief to prevent Edison's from continuing its exclusionary conduct.

Edison answered and filed a series of motions for partial summary judgment for the purpose of which it conceded that it had monopoly power in all of the relevant wholesale and retail markets, that its transmission system was an essential facility, and that Vernon was its wholesale customer and competitor. Edison contended that it had no antitrust obligation to transmit ("wheel") non-Edison power to Vernon because its transmission lines were "fully utilized,"[2] and, even, if it had excess transmission capacity, it had a legitimate business justification for its conduct because allowing access to transmission would permit Vernon successfully to compete with it in purchasing low-cost wholesale power and thereby could have caused Edison to raise its rates to its retail customers.[3] Edison offered no evidence to prove that it would or could have raised its retail rates if reasonable access had been given to Vernon.

Vernon filed counter-declarations *prima facie* establishing its Section 2 liability case and provided evidence that Edison had excess transmission capacity and that Edison's claimed concern

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[2]Edison's sole evidence to support its full utilization argument was the testimony of one witness who also admitted that Edison considered a transmission line fully utilized unless the line was out of service *and* disconnected. O'Malley Decl. Ex. A, Sept. 17, 1990 (CR 298; ER 831-39).

[3]The predicate for the defense was Edison's attack on one hypothesis in Vernon's damage study, postulating a *de minimus* temporary retail rate increase during the damage period *if* Vernon had been permitted transmission on reasonable terms and conditions, *if* Edison had not responded to competition by becoming more efficient, *if* it had sought a rate increase, and *if* the California Public Utilities Commission ("CPUC") would have approved one. Edison offered no evidence that any of the conditions precedent would have occurred; rather, Edison's own study showed no impact on its retail customers from reasonably sharing transmission with Vernon.

for its retail ratepayers was pretextual.[4] Vernon contended that a monoplist could not assert a valid business justification defense based on its claim that sharing an essential facility with a competitor could create competition adversely affecting it or its other customers. Even if a motivation to protect Edison's retail customers from the results of an outbreak of competition could be a legitimate business defense, Edison's motive was to protect and extend its admitted monopoly power in the relevant markets and not to put a protective arm around its retail ratepayers.[5] Vernon's study quantifying the damages it suffered from Edison's unreasonable foreclosure was admitted in evidence over Edison's objections.[6]

By minute order dated March 1, 1990, the district court granted Edison's motion for partial summary judgment on Vernon's Section 2 Sherman Act claim. On August 30, 1990, the court filed findings of fact and conclusions of law on the Section 2 claim[7] and thereafter granted summary judgment for Edison on

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[4]Vernon produced evidence that Edison uses no more than 75 percent of its transmission for firm power resources (CR 185, ER 535-36), that its local network was unconstrained, that it had significant excess capacity in its long line transmission (La Pierre Foreclosure Declaration 20, 43), and that Edison had an additional 400 megawatt of excess capacity available on its system from simple adjustments in operating procedures. CR 177, ER 249. The Court of Appeals disregarded Vernon's evidence on these points.

[5]Vernon produced evidence that while Edison was unreasonably restricting transmission, it was building new transmission lines that provided no reasonable rate of return, purchasing extravagantly expensive power from some of its unregulated affiliates to the detriment of its ratepayers, and filing rate applications to increase prices to its ratepayers which the CPUC found were unjustified. O'Malley Decl., Ex. F, filed Nov. 14, 1989 (CR 183; ER 414-15); *id.* at Ex. G (ER 417-19); O'Malley Decl., Ex. I, filed Sept. 17, 1990 (CR 298; ER 967). The court ruled that the evidence was insufficient to raise a question of fact about Edison's motives.

[6]RT 19, Mar. 6, 1990 hearing (ER 765).

[7]App. at 25 *et seq.*

all of Vernon's antitrust claims.[8] The district court denied Vernon's motion for reconsideration.[9]

Vernon appealed. On February 7, 1992, the Court of Appeals filed its opinion affirming the district court's summary judgment in all respects other than its denial of injunctive relief with respect to the "generic Intergrated Operations Agreement" ("IOA"), which it remanded to the district court.[10]

Undisputed Facts. The basic facts of electric utility life in California have never been disputed. Major electric utilities, like Edison, are subject to both federal and state regulation. Congress delegated to the Federal Energy Regulatory Commission ("FERC") the regulation of interstate transmission of electricity and rates for wholesale power.[11] Agreements with respect to interstate transmission must be filed by Edison with FERC, and changes in rates (tariffs) must likewise be filed by Edison and FERC. The California Public Utilities Commission ("CPUC") regulates Edison's retail rates and has been delegated power to regulate proposed mergers of California public utility companies.[12] Neither FERC nor CPUC has been delegated power to enforce federal antitrust laws, but both are required to take into account anticompetitive consequences in deciding whether appli-

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[8]The district court *sua sponte* granted summary judgment on Vernon's § 1 claim that Edison had conspired with others to prevent its having access to the Pacific Intertie; Vernon was given no opportunity to present any evidence in opposition to the court's summary disposition of that claim.

[9]App. at 50.

[10]Until Edison filed its generic IOA, it foreclosed any access to firm transmission. The Federal Energy Regulatory Commission ("FERC") ultimately invalidated as unjust and unreasonable several of the terms of the IOA. *Southern California Edison Co.*, 39 FERC ¶ 63,045 (1987) *aff'd in part and rev'd in non-pertinent part*, 55 FERC ¶ 61,074 (1991); *Southern California Edison Co.*, 41 FERC ¶ 61,188 (1987), *reaff'd on rehearing*, 52 FERC ¶ 61,299 (1990), *petition for review dismissed* (1991) (unpublished order, App. at 52).

[11]The Federal Power Act, 16 U.S.C. §§ 791 *et seq.*

[12]Cal. Pub. Utilities Code § 854.

cations for changes in rates or structures of electric utility companies are in the public interest.[13]

For many years locally generated power has been inadequate to meet the demands for electricity in the heavily populated areas of the State. The major electric utility companies in California (Edison, San Diego Gas & Electric Company, and Pacific Gas & Electric Company) therefore buy and import power from the remote power hubs in the Pacific Northwest and Southwest where large quantities of power are generated.[14]

Edison's transmission system consists of an "integrated network" (220 kV facilities and related 500 kV lines) that crisscrosses the Los Angeles Basin to connect Edison with its customers and other electric utilities and its long-line extra high voltage ("EHV") import lines that transport bulk power from remote sources for delivery to its integrated network.[15] Edison's dispatchers buy, sell, and transmit bulk power minute-by-minute around the clock.[16]

Vernon generates a small amount of the power it sells to its retail customers within the City. Its remaining needs must be

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[13]*E.g., Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747 (1973); *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1976).

[14]Koehn Decl., para 23, filed Nov. 16, 1989 (CR 185; ER 538-39).

[15]Edison ownes or has entitlement to transmission lines from the Pacific Northwest (the Pacific Interie), from Mead/Eldorado (Colorado River hydro-generation and coal-fired generation), from the Southwest (the Eldorado-Moenkopi-Four Corners line) and from the Devers-Palo Verde line (nuclear fuel generation). The line from the Colorado River to the Eldorado substation in Las Vegas is owned exclusively by Edison. Koehn Decl., *supra*, n. 7 at paras. 17-19.

[16]La Pierre Foreclosure Reply Decl., Ex. 41-42.

Transmission can be and is bought and sold separately from the power transmitted over it. *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,284 (1986). Transmission is sold as either "firm" or "interruptible." "Firm" transmission guarantees the purchaser the use of transmission unless there is a physical outage or a system emergency. "Interruptible" transmission is offered on an "as available" basis subject to curtailment under specified conditions.

purchased from others for resale to its retail customers. Vernon cannot buy one kilowatt of power from any non-Edison source without access to some part of Edison's transmission system. (Edison's wholesale tariffs prohibits Vernon from directly interconnecting with any other utility.[17]) In conceding that its transmission system was an essential facility, Edison necessarily also conceded that Vernon cannot compete with it in buying power from bulk powers vendors in the regional hub markets and those vendors cannot compete with Edison to sell to Vernon without access to Edison's transmission system.

Vernon's lengthy battles to obtain access to third party sources allowing it to compete with Edison were well documented. Vernon and the other cities in Edison's control area buying wholesale power for resale to their retail customers ("Resale Cities") were Edison's captive customers for all of their requirements until after some of the Resale Cities filed antitrust charges against it before federal regulatory agencies.

To settle the antitrust issues, Edison agreed in 1972 to provide its Resale Cities with a tariff by which they could purchase power from others and could use the power they generated themselves on reasonable terms.[18] Years later, Edison finally offered the "generic" IOA permitting highly restricted access to its integrated network (but none on Edison's EHV import lines) and allowing (at times of its own choosing) "capacity credits" for some non-Edison power resources.[19] Without capacity credits,

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[17]La Pierre Foreclosure Reply Decl., *supra*, n. 16; Koehn Decl., *supra*, n. 14, at para. 25.

[18]*Southern California Edison Co.*, 49 FPC 717 (1973).

[19]A "capacity credit" is a reduction of the price that a Resale City must pay Edison which takes into account power bought from non-Edison sources. Edison's rates to its wholesale customers included an "energy charge" for the amount of energy actually used by the customer and a "demand charge" representing the amount of generating facilities that Edison must maintain to serve the customer's demand for power. (Ferguson Decl., paras. 5, 7, filed Aug. 14, 1989 (CR 130; ER 42-43).) Until 1979, Edison's partial requirements rate filed with FERC required a Resale City to pay Edison a demand charge for each kilowatt of demand on the resale system whether Edison supplied the kilowatt or not. Capacity credits reduce the amount of the demand charge.

Resale Cities buying wholesale power receive no economic benefit from third party purchases or for power generated themselves. The Resale Cities, other than Vernon, signed the generic IOA in 1977. Vernon refused because the terms were unreasonable and the agreement provided no way for a Resale City to import power from others for peak usage periods ("peaking power") on a practicable basis.[20] Vernon challenged the unreasonable terms of the generic IOA before FERC in 1980, and FERC invalidated a number of them.[21]

To remove from the FERC litigation Vernon's challenge to the generic IOA based on peaking power deficiencies, Edison entered into an agreement with Vernon in 1983 promising to file a tariff with FERC allowing Resale Cities to acquire peaking resources from others on an economical basis.[22] Edison again delayed filing the necessary tariff (Special Condition 12, "SC-12") with FERC until January 1, 1987. Edison permitted no firm transmission to any Resale City for non-Edison power until it filed the generic IOA on terms that FERC invalidated. Until Edison filed SC-12, it removed none of the unreasonable terms of the IOA. Edison

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[20]A utility needs baseload power to service the system at its point of lowest demand. Peaking power is used to meet temporary demands in excess of the baseload requirement.

[21]Other Resale Cities thereafter joined Vernon in the ensuing lengthy litigation over the reasonableness of the terms of the generic IOA. In 1991, FERC's invalidation of those terms became final when the Court of Appeals for the District of Columbia Circuit dismissed Edison's petition to review the agency's decision. *Southern California Edison Co., supra*, n. 10.

Although Vernon never accepted the generic IOA, it signed a different IOA limited to its obtaining some transmission on Edison's local network for its entitlement to power generated by the Palo Verde Nuclear Generating Station. Edison knew that Vernon refused to sign the restricted IOA, despite its unreasonable terms, Vernon's multimullion investment in Palo Verde would have been worthless. O'Malley Decl., Exs. P, U, filed Nov. 28, 1989 (CR 193; ER 585, 712); *id.* at Ex. FF (ER 725). Edison refused to permit any transmission for Vernon's Palo Verde power on its direct long EHV line. Brearley Decl., paras. 4, 5, filed Nov. 29, 1989 (CR 211, ER 744).

[22]*Southern California Edison Co., supra*, n. 10.

has yet to file a tariff that cures the other deficiencies that FERC has found in the IOA.

Vernon produced abundant evidence of Edison's repeated refusals to provide transmission for Vernon's purchases or potential purchases of power from non-Edison sources and its inexcusable interruptions of the limited transmission it permitted.[23] With the exception of Hoover/Mead, Edison has always refused to grant Vernon any firm access to its EHV lines to reach any of the bulk power markets in the Southwest or Pacific Northwest. With the exeption of Vernon's Hoover/Mead and Palo Verde entitlement, Edison has permitted transmission solely on its integrated network (220 kV grid) on a short-term basis.

The District Court's Decision. The district court held: (1) Edison had no antitrust duty to share its transmission facilities with Vernon because a monopolist has "no generalized duty to extend a helping hand to its competititors"[24]; (2) even if a duty existed to share transmission with Vernon, Edison had a valid business justification for restricting or entirely foreclosing access because sharing transmission would allow Vernon to compete successfully with Edison in buying low-cost wholesale power thereby potentially increasing the prices that Edison was charging to its other customers;[25] (3) Vernon's evidence of Edison's conduct antithetical to the interests of its ratepayers (while at the same time using its monopoly power to prevent Vernon from competing with it) and its long history of exclusionary conduct were insufficient as a matter of law to create a triable issue of fact

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[23]*E.g.*, Edison interrupted transmission of non-firm energy flowing from Nevada Power to Vernon so often that Nevada Power was unable to perform its contract to deliver power to Vernon.

[24]Findings of Fact and Conclusions of Law, App. at 45.

[25]"Reasonable access does not include that which would harm Edison's other customers . . . ." App. at 42. "Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers." App. at 43. "Edison's denial of access to its transmission system was motivated by a desire to benefit its own customers rather than just Vernon. This is a legitimate business justification." App. at 43. "As a matter of law, Edison's conduct with respect to transmission has not been unreasonably exclusionary." App. at 44.

with respect to pretextuality.[26] The court disregarded Edison's failure to offer evidence of any efficiency justification for its competitive restraints or any pro-competitive consequences therefrom.

The Court of Appeals Decision. The Court of Appeals held: (1) Edison was not required by Section 2 of the Sherman Act to share its transmission system with Vernon because Edison was using the system and because Edison's retail customers could have had to pay higher rates if Edison permitted Vernon to compete with it in buying low cost power.[27] Like the district court, the Court of Appeals disregarded the lack of any efficiency gains or competitive justification for Edison's conduct. Without discussion, the Court affirmed the district court's conclusion that Vernon's evidence of pretextuality was insufficient as a matter of

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[26]"Vernon failed to submit any facts sufficient to controvert or to raise a factual dispute underlying the issue of legitimate business justification." App. at 38. The court did not say why Vernon's evidence of pretextuality was insufficient.

[27]"It is legitimate for Edision to refuse access that will affect its rates to the detriment of its customers. See *City of Anaheim*, at 1381." *City of Vernon*, 955 F.2d 1361, 1366, App. at 10. (The court's reference is to *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1381, handed down the same day as the opinion in *Vernon* by the same panel; that case was fully tried by the district court sitting without a jury and the district court found as a fact that the particular transmission line to which the Cities sought access was not an essential facility. The district judge who decided *Vernon* was the same judge who had earlier tried *City of Anaheim*.)

"Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it." 955 F.2d at 1366, App. at 10. Citing *City of Anaheim, supra*, the court also said: "The demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head." *City of Vernon*, 955 F.2d at 1367, App. at 11.

Like the lower court, the Circuit disregarded Vernon's evidence that Edison had excess transmission capacity available for both firm and interruptible transmission; *i.e.*, it had idle lines, as Edison's own witness conceded.

law.[28] (2) Vernon produced no evidence of damages because its damage study used pro rata access ("relative size share") as an acceptable method of quantifying reasonable access to compute damages and that assumption was erroneous as a matter of law.[29]

According to the opinion, Edison would have been justified in completely foreclosing Vernon's access to transmission because Edison had "a use" for its lines; Vernon had no cause for antitrust complaint as long as Edison was willing to supply its energy requirements at Edison's prices;[30] and Vernon had the burden of proving Edison's lack of business justification which it failed to do.

Regulatory Agency Decisions. After judgment in the district court and during the pendency of Vernon's appeal, the FERC

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[28]*City of Vernon*, 955 F.2d at 1366, App. at 10.

[29][N]o authority . . . supports Vernon's theory that 'reasonable' access to Edison's facilities must take the form of relative size share access." *Id.* at 1367, App. at 11. "Vernon's deeply flawed study is the handmaiden of its equally flawed theory that it should have proportionate firm access to Edison's whole system at all times." *Id.* at 1372, App. at 21. The court disregarded the fact that Vernon did not contend that relative size share access was the only means of quantifying reasonable access; Vernon contended that relative size share is one of the acceptable means for doing so, and Edison offered no other. Edison conceded that the question whether it would have agreed to a formal demand for pro rata access was triable.

[30]"This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use. . . . Nor is it case where Edison simply refused to supply Vernon with it power needs. . . . Edison clearly had a use for its lines. As we pointed out in *City of Anaheim*, at 1380-81, the demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head." *City of Vernon*, 955 F.2d at 1366-67, App. at 10. The court disregarded Vernon's evidence that Edison had excess transmission capacity.

"Although the defendant generally has the burden of coming forward with a legitimate business justification after the plaintiff has shown evidence of monopolistic intent, the plaintiff in this case, Vernon, ultimately has the burden of proving that the defendant acted without a legitimate business justification." *Id.* at 1366, App. at 10.

decision invalidating several provisions of the generic IOA became final when the District of Columbia Circuit dismissed Edison's petition for review in 1991.[31] During the same period, the CPUC's decision denying the application of Edison's parent corporation to merge Edison with the San Diego Gas & Electric Company became final.[32] The CPUC found that Edison "used its transmission dominance to undercut the cities' efforts to lower costs to their retail customers," and it concluded that "Edison has used its strategic control over transmission to the competitive disadvantage of other utilities, who are buyers and sellers in the relevant interregional transmission markets and in the network transmission market."[33]

REASONS FOR GRANTING THE WRIT

Introduction. Efficient generation, transmission and distribution of electricity are vital to the Nation's economic health. To reach the national goals of efficiency in the industry, enhancement of generation capacity, and lower prices for energy, competition is essential, as Congress and the regulatory agencies have agreed. The Ninth Circuit has not.

If the Ninth Circuit's decision is permitted to stand, it will have grave effects on competition in the electric utility industry and thus on the economy. That court has created a new business justification defense by holding that a vertically integrated electric utility can foreclose access to its essential transmission system if the utility has some use for its lines (even if its "use" is keeping the lines unloaded), or if selling transmission to a competitor could adversely affect its price levels to its own customers. In

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[31] *Southern California Edison Co., supra*, n. 10. The unpublished order of dismissal is printed App. at p. 52.

[32] *In the Matter of the Application of Southern California Edison and its public utility subsidiary Southern California Edison Company and San Diego Gas & Electric Company for Authority to Merge San Diego Gas & Electric Company into Southern California Edison Company*, 122 PUR 4th 225 (1991) (hereafter "*CPUC Merger Case*"). Relevant portions of this extremely long opinion are printed in App. at 73 *et seq.*

[33] *CPUC Merger Case, supra* note, 30 122 PUR 4th at 258, App. at 78, 78. These final decisions of FERC and CPUC collaterally estop Edison.

reaching its extraordinary conclusions, the Ninth Circuit is in conflict with the decisions of this Court, of other circuits, and of regulatory agencies enforcing the economic policies mandated by Congress.

The major utility companies, like Edison, are no longer local monopolies, generating all of the power delivered to local requirements customers. Instead, there are mega-utilities, buying and selling transmission and bulk power among themselves and from competitors transnationally and internationally.[34] The impact of the decision is thus far beyond its effect on a small industrial city by insulating major utilities from anticompetitive conduct, the Circuit has created an implied repeal of the antitrust laws applicable to electric utilities and has thereby prevented major utilities' wholesale customers and their retail customers from receiving the benefits that would otherwise flow to them from competition.

I.

THE NINTH CIRCUIT'S HOLDING THAT A MONOPOLIST CAN IMMUNIZE ITSELF FROM LIABILITY FOR ANTICOMPETITIVE CONDUCT BECAUSE COMPETITION WOULD ADVERSELY AFFECT ITSELF OR ITS CUSTOMERS IS CONTRARY TO OPINIONS OF THIS COURT, TO THOSE OF OTHER CIRCUITS, AND TO NATIONAL ANTITRUST POLICY MANDATED BY CONGRESS

A. The Decision Conflicts with Controlling Decisions of this Court

Protecting a monopolist or its customers from potential adverse affects of competition has never been accepted by this Court as a valid business justification for anticompetitive conduct. Nor has the Court sustained a business justification defense when an antitrust defendant has failed to produce evidence that its exclu-

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[34]One-third all electricity sold by investor owned electric utilities to ultimate consumers is purchased from other sources. High voltage transmission has grown nationally from 22,000 circuit miles in 1960 to 130,000 circuit miles in 1990. *Public Service Co. of Indiana,* 51 FERC ¶ 61,367 at 62,224 (1990).

sionary conduct had any procompetitive effects, any efficiency gains, or a benefit to anyone other than its stockholders and, possibly, a slight short-term benefit to its retail customers.[35]

Vernon established its *prima facie* Section 2 liability case: Edison had monopoly power in the relevant wholesale and retail markets; Vernon was Edison's wholesale customer and competitor;[36] access to Edison's transmission system was essential to competition in those markets; Edison refused to permit Vernon reasonable access to transmission; and Vernon sustained antitrust injury therefrom. Vernon also produced evidence that Edison had excess transmission capacity, and, on appeal, Edison conceded that wheeling non-Edison wholesale power to Vernon would not have increased the burden on its transmission system.[37]

Maintaining price levels is not a valid business justification for anticompetitive conduct. "Price is the 'central nervous system of the economy' ", *National Society of Professional Engineers v.*

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[35]Under rate regulation, some of a monopolist's rents are not retained by its stockholders, but are required to flow to its customers. The Ninth Circuit held that the monopolist's customers cannnot be deprived of any part of this "benefit" by permitting competition.

[36]In 1987, Edison's CEO admitted that its Resale Cities' utility systems (including Vernon's) were likely takeover targets. O'Malley Decl. in Support of Franchise Summary Judgment, at 326-28.

[37]"There may have been 'no burden' on the 'system,' but there clearly would have been the burden of increase costs on Edison's other customers." Edison's responding brief, at 26. It could not have avoided the concession because Edison's system adequately accommodated the requirements of all of its retail customers and all of the Resale Cities when they were full requirements customers. That fact, alone, was enough to raise a triable issue about the capacity of Edison's system to sell transmission to Vernon. *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 204 (1991) (feasibility of access to defendant's railroad demonstrated by fact that railroad permitted continuous use of its tracks to plaintiff until access was restricted). Moreover, the *CPUC Merger Case* decided that Edison's system had ample capacity to accommodate its own customers and that of the Resale Cities for non-Edison purchases. App. at 76-77. The decision is final and collaterally estops Edison from claiming otherwise.

United States, 435 U.S. 679, 692 (1978), and competition is the lifeblood of a free market economy.

The Ninth Circuit's holding that Edison was justified in denying access to transmission to prevent competition from disturbing its rates to its retail customers is contrary to the teaching of *National Society of Professional Engineers* and its predecessors. In that case, the defendant was charged with violating Section 1 of the Sherman Act by its ethical rule prohibiting competitive bidding by its members; defendant argued that the rule was justified to minimize the risk that competition would produce inferior engineering thereby endangering public safety. The Court recognized that the logic of the rule was to protect the price level. Flatly rejecting the defendant's contention, the Court said that the defense was "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695. The Court said:

> "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Ibid.*[38]

The principles applied in *National Society of Professional Engineers* repeat those stated in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

Contrary to the Ninth Circuit, anticompetitive conduct is not justified to maintain the prices the defendant charges its customers, and such conduct is not immunized or exempted because the actor is a public utility that lawfully obtained its monopoly power. As this Court held in *United States v. Griffith*, 334 U.S. 100, 107 (1948), "the use of monopoly power, however lawfully acquired,

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[38]Although this was § 1 case, the same principles apply to a § 2 case. *E.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951) (anticompetitive acts forbidden by § 1 when done by a combination are also violations of § 2 when done by a monopolist).

to foreclose competition, to gain a competitive advantage or to destroy a competitor", is an abuse of monopoly power under the Sherman Act.[39]

A monopolist's exclusionary conduct is not excused because its customer-competitor can still buy the monopolist's products. Under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), Edison had an affirmative antitrust duty to provide Vernon reasonable access to its essential transmission system. The Ninth Circuit gave two reasons for relieving Edison of its duty: (1) "Edison clearly had a use for its lines"; "[t]his is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use"; and (2) "[n]or is it a case where Edison simply refused to supply Vernon with its power needs. *See Otter Tail Power Co. v. United States*, 410 U.S. 366."[40]

In reaching its second conclusion, the court assumes that transmission could not be essential to Vernon if it could continue to buy power from Edison at non-market prices. It is that assumption that turns *Otter Tail* upsidedown because the rationale for requiring a monopolist to share an essential facility is not to preserve the competitor's access to the monopolist's products,

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[39]Although *Griffith* was overruled on other grounds in *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984), its continued vitality on this point has been repeatedly reaffirmed. *E.g.*, *Eastman Kodak Co. v. Image Technical Serv. Inc.*, 60 U.S.L.W. 4465, 4474 (1992); *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 600-05 (1985); *Lorain Journal Co. v. United States, supra*, 342 U.S. at 154.

[40]*City of Vernon, supra*, 955 F.2d at 1366-67, App. at 10. In reaching those conclusions, the court disregarded Vernon's evidence that Edison had excess transmission capacity after it fulfilled all of its own needs together with the transmission that Vernon sought to buy. Thereby, the court violated the controlling decisions of this Court that, on summary judgment, " '[t]he evidence of [the party opposing summary judgment] is to be believed, and all justifiable inferences are to be drawn in [their] favor.' " *Eastman Kodak Co., supra*, 60 U.S.L.W. at 4466, (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). [First bracket phrase added; second bracket by Court.]

but to preserve competition in the relevant markets. The antitrust laws protect competition, not competitors, and Edison's exclusionary conduct created the very harm to the competitive process that the antitrust laws were intended to prevent thereby causing Vernon antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

This Court has never relieved a monopolist controlling a facility essential to competition from a duty to share it fairly with a competitor because the defendant had some use for the facility or because a monopolist was willing to continue to sell its products to a competitor.[41] If the Circuit's extraordinary conclusion is permitted to stand, it effectively eliminates competition between cities and monopolistic utilities in the relevant power markets. What monopolist would sell transmission to a customer-competitor if it could insulate itself from antitrust liability for excluding access merely by continuing to bundle transmission with power and selling the bundle to the same customers and would-be competitors at the same prices?

No business justification exists when anticompetitive conduct provides no efficiency gains and no pro-competitive effects. Because *Otter Tail* and *Terminal R.R.* require Edison to provide Vernon reasonable access to transmission, Edison had the "heavy burden of establishing an affirmative defense which competitively justifies [its] apparent deviation from the operations of a free market." *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113 (1984). Edison could not meet that burden without proving that the "anticompetitive effects of [its] behavior are outweighed by its competitive effects." *Eastman Kodak Co. v.*

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[41]In *Otter Tail*, the utility's lines were every bit as much in use as were Edison's; nothing in *Otter Tail* suggests that the Court's conclusion would have been different if that utility was willing to sell power at the same prices to its captive customer-competitors. Like Edison, the utility in *Otter Tail* refused to unbundle transmission from wholesale power. *Compare United States v. Terminal R.R. Ass'n, supra*, 224 U.S. 383 (railroad consortium owning railroad bridges essential to reach St. Louis that denied rival railroads access to the bridges was required to share the bridges fairly although the owners were unquestionably using the bridges themselves).

Image Technical Serv., Inc., supra, 60 U.S.L.W. at 4475. It offered no evidence of any procompetitive effects of its exclusionary conduct.

In determining whether anticompetitive conduct is unreasonably exclusionary, a court must consider not only the impact of the conduct on the monopolist and its customers, but also the impact on the competitor and the competitor's customers. *Aspen Skiing Co. v. Aspen Highland Skiing Corp., supra*, 472 U.S. at 605. Edison's conduct injured Vernon and its retail customers even if it were correct that foreclosing access to transmission was a "benefit" to Edison's own retail customers.

Like *Aspen Skiing*, Edison chose to forego short-term benefits (selling excess transmission capacity to Vernon) in favor of its long-term objective (restraining competition in the relevant markets to maintain its pricing levels at the expense of Vernon, other Retail Cities, and their retail customers). Edison's conduct is deemed predatory because it was thereby " 'attempting to exclude rivals on some basis other than efficiency.' " *Aspen Skiing Co. v. Aspen Highland Skiing Corp., supra*, 472 U.S. at 605. Edison offered no evidence of any efficiency gains from its competitive restraints; for reasons stated in *Otter Tail*, it could not have done so.

In *Otter Tail*, an electric utility refused to wheel power to cities that had formerly been its captive customers when the cities sought to buy lower cost power from others. Explaining why threatened destruction of the utility's business was not a valid justification for its conduct, the Court said:

> "That [Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power." 410 U.S. at 380.

As the Court held in *National Society of Professional Engineers*, antitrust defendants are not insulated from liability because competition is "bad" for the defendant's customers or constituents. For example, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the City argued that it should be immunized from its anticompetitive conduct because competition would increase the cost to its constituents and that it should be

exempt from the antitrust laws because it was motivated by an interest in its citizenry, rather than in private profit. The Court rejected both arguments. The Court explained that even if the anticompetitive activities provide the maximum benefits for the City's constituents, that fact could not provide an antitrust defense.[42] If increased costs to constituents were a business justification, joint purchasing agreements would be legal *per se*, and antitrust exemptions for agricultural cooperatives provided by the Capper-Volstead Act would be unnecessary, and they are not.

The Ninth Circuit's decision permits monopoly to beget monopoly. Edison used its transmission monopoly to maintain and extend its monopoly power in the relevant markets — conduct long condemned as a violation of Section 2 of the Sherman Act. Thus in *Lorain Journal Co.*, 342 U.S. 143, defendant newspaper with monopoly power over local advertising, refused to accept advertising from those who advertised on a local radio station, thereby impairing the station's ability to compete with it. Although the Sherman Act does not impose a general duty to deal, refusals to deal in the face of an affirmative duty to do so or refusals for the purpose of creating or maintaining a monopoly

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[42]See discussion, *infra*, pp. 21-23. On the same reasoning, other circuits have refused to excuse anticompetitive conduct because impairing competition protected the defendant, its customers, or promoted the public good. *E.g.*, *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. L.&P. Co.*, 184 F.2d 552, 559 (4th Cir.) 340 U.S. 906 (1950) (rejecting utility's argument that territorial constraints on competition were justified because permitted utilities to operate efficiently for the benefit of the public: "Congress has determined that the greater good is served by the maintenance of competition and its decision in the field of interstate commerce must control"), *cert. denied*, 340 U.S. 906 (1950); *Northern Natural Gas Co. v. Federal Power Comm'n*, 399 F.2d 953, 970 (D.C. Cir. 1968) (rejecting utility's justification of anticompetitive conduct to protect costs to its customers); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (judgment for defendant owner of professional sports stadium reversed because jury erroneously instructed that it could take into account defendant's promotion of its self-interest), *cert. denied*, 436 U.S. 956 (1978).

"violates the 'attempt to monopolize' clause of § 2.' "[43] 342 U.S. at 154.

Edison's manifest purpose in refusing to sell transmission was to destroy threatened competition between itself and Vernon and to use its strategic dominance of transmission to impair or destroy competition between it and rival wholesale power vendors in the relevant markets. By entirely foreclosing or inexcuseably interrupting transmission from non-Edison vendors, such as Nevada Power Co., Edison forced Vernon to buy bundled power and transmission from it thereby maintaining Edison's monopoly power, its price levels, and its market share. Edison's conduct was a forbidden abuse of monopoly power as this Court concluded in *Otter Tail, Lorain Journal*, and *Terminal Railroad*.[44] In excusing Edison's abuse of its monopoly power, the Circuit failed to heed this Court's warnings in *Griffith*: "If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed." 334 U.S. at 108.

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[43]The *Lorain* principles have long been accepted by the Court. *E.g., Associated Press v. United States*, 326 U.S. 1 (1934); *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[44]Circuits, other than the Ninth, have reached similar conclusions for the same and other reasons. *E.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) ("the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2"), *cert. denied*, 444 U.S. 1093 (1980); *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1556-68 (11th Cir. 1990) (applying principles of *Berkey*); *Kerasotes Mich. Theaters v. National Amusements, Inc.*, 854 F.2d 135, 136-37 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989) (same); *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (monopolist abused monopoly power by intentionally using that power at the manufacturing level to eliminate the plaintiff as a competitor at the distributor-jobber level); *MCI Communications Corp. v. American T.&T. Co.*, 708 F.2d 1081, 1144 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

B. The Ninth Circuit Decision Conflicts with the Decisions of Other Circuits

Other circuits have faithfully followed this Court's decisions requiring the owner of an essential facility to share it fairly with competitors and refusing to excuse exclusionary conduct because competition could hurt the antitrust defendant and possibly its customers.[45]

In *MCI Communications Corp., supra,* 708 F.2d 1081, the court affirmed AT&T's liability for violating Section 2 of the Sherman Act by refusing to connect MCI, its competitor in long distance transmission, with AT&T's local monopoly. AT&T's local network was held adequate to supply MCI access even though AT&T obviously could not simultaneously use its local network to transmit its own long distance calls when, for the moment, a residential line was being used to connect a residential

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[45] *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984) (applying essential facilities doctrine to uphold antitrust liability for exclusionary conduct impairing competition by its rival), *aff'd on other grounds, supra,* 472 U.S. 585; *Southern Pacific Communications Co. v. American Tel. & Tel.*, 740 F.2d 980 (D.C. Cir. 1984) (specialized inner city telephone carrier proved *prima facie* antitrust liability by AT&T's anticompetitive practices with respect to interconnection; AT&T's defeated liability by establishing its regulatory justification defense after full trial); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (defendant's refusal to lease sports stadium to plaintiff, essential to plaintiff's acquiring basketball franchise, proved *prima facie* antitrust liability, and defendant's claim that plaintiff was financially irresponsible was pretextual); *Hecht v. Pro-Football, Inc., supra,* 570 F.2d 982 (denial of access to sports stadium); *Gamco Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), (refusal fairly to share building essential to competition in wholesale produce market violated § 2 of the Sherman Act even though space was occupied by others), *cert. denied*, 344 U.S. 817 (1952). *But see City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992) (gas line owners could foreclose access to competitors for owners' profit), *cert. petition pending,* ____ U.S. ____ (1992).

customer with MCI's long distance service.[46] That fact did not relieve AT&T of its duty to share transmission fairly with MCI.

The liability holding in *MCI Communications* cannot be distinguished from this case.[47] Like Edison, AT&T had enough capacity to supply reasonable access to its competitor without impairing its ability adequately to serve its own customers. Edison was no more asked by Vernon to cease using its facilities for Vernon's benefit, than AT&T was required to cease using its own facilities for MCI's benefit. Like telephone service, electric power is bought, sold and transmitted minute by minute.

The Second Circuit reached similar conclusions in *Delaware & Hudson Ry. Co.*, *supra*, 902 F.2d 174. Plaintiff was a relatively small rail carrier seeking to compete with the defendant in the carriage of newsprint from eastern Canada to the mid-Atlantic states. Defendant controlled the short-haul tracks that plaintiff needed to be able to compete in that market. Although defendant did not absolutely refuse to supply plaintiff with the line, it offered to do so only on unreasonable terms. The Second Circuit reversed summary judgment for the defendant. Unreasonable restriction of access need not be total in order to find that access has been unreasonably restrained: "[i]t is sufficient if the terms of the offer to deal are unreasonable." *Id.* at 179-80. The reasonableness of the terms upon which access was permitted is an issue of fact for

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[46]The Seventh Circuit also held that questions relating to the reasonableness of the restrictions that AT&T imposed on MCI and its motivations for its conduct were properly left to a jury. That court reversed and remanded for a new trial solely on the issue of damages.

[47]The Ninth Circuit unsuccessfully tried to do so stating: "This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.) (AT&T was not asked to abandon its facilities; no business reason shown for refusal), *cert. denied*, 464 U.S. 891 . . . ." *City of Vernon*, 955 F.2d at 1366-67, App. at 10.

a jury.[48] The defendant could not justify its anticompetitive conduct simply because that conduct also provided it with short-term profits.

In *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), the court rejected the utility's argument that its anticompetitive conduct was justified to protect its customers from adverse consequences of competition: "Expressed preference in favor ot its own retail customers" is evidence of "a specific intent to capitalize on and increase its monopoly power at the expense of the municipalities."

C. The Ninth Circuit's Decision is Contrary to Congressional Mandates

Congress established that competition is the Nation's basic economic policy when it enacted the Sherman Act. Its intention has thereafter been explicitly stated that regulated public utilities are subject to the antitrust laws; *e.g.*, the Federal Power Act, 16 U.S.C. § 2603, provides: "Nothing in this Act or in any amendment made by this Act affects . . . the applicability of the antitrust laws to any electric utility."[49] As this Court said in *Otter Tail*, part II of the Federal Power Act "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." 410 U.S. at 378.

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[48]FERC has found that terms of the generic IOA were unreasonable and that decision collaterally estops Edison. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) (final adjudicatory agency decisions have the force of judgments).

[49]The legislative history of the Federal Power Act, as amended, reinforces that intent. "The conferees specifically intend to preserve jurisdiction of Federal and State Courts to resolve, independent of the Commission, such actions, including for example, cases where a refusal to wheel electric energy is alleged to be in violation of such laws. . . . . [T]he courts have jurisdiction to proceed with antitrust cases without deferring to the Commission for exercise of primary jurisdiction." H.R. Rep. No. 95-1750 (Conf. Rep. on H.R. 4018), 95th Cong., 2d Sess. 6, *reprinted in 1978 U.S. Code Cong. & Admin. News* 7797, 7802.

Congress has repeatedly rebuffed utilities' efforts to obtain antitrust sanctuary since 1914 when it was considering legislation that became the Clayton Act. Since then it has required the regulatory agencies to consider antitrust implications in reaching their decisions even when the agencies, such as FERC and CPUC, have not been given power directly to enforce the antitrust laws.[50]

Following the Congressional mandates and the teachings of this Court, the regulatory agencies have repeatedly examined the anticompetitive effects of actions or proposed actions by electric utilities in deciding the regulatory issues before them, and they have stressed the value of competition in the electric utility industry.[51] As FERC said in *Gulf States Utilities Co.*, 5 FERC ¶ 61,066 at 61,098 (1978):

> "It is axiomatic that competition creates pressure on electric utilities to reduce their costs and increase their efficiency and power supply production and marketing. This downward pressure on costs supports our direct regulation of rates to the ultimate benefit of consumers of electricity."

FERC recognizes that increasing competitive pressures not only increases efficiency in the industry, but also encourages vitally needed competition to increase the generation of power for

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[50] *E.g., Hearings on Trust Legislation before House Committee on the Judiciary*, 63d Cong., 2d Sess., at 1825 (1914). Section 105(c) of the Atomic Energy Act of 1954, as amended in 1970, recites that "[n]othing contained in this Act shall relieve any person from the operation of the following acts, as amended," citing the Sherman Act, the Clayton Act, and the act creating the Federal Trade Commission. One of the purposes stated for the enactment of the Department of Energy Organization Act, 42 U.S.C. § 7112, is "to foster and assure competition among parties engaged in the supply of energy and fuels."

[51] *City of Huntingburg v. FPC*, 498 F.2d 778 (D.C. Cir. 1974) (directed FERC to consider whether interconnection contained competitive restraints); *Florida Power & Light*, 8 FERC para. 61,121 (1979) (anticompetitive consequences considered in reviewing wholesale rates); *CPUC Merger Case*, App. at 73.

national consumption; therefore, FERC has strongly urged increased access to transmission because competition in the generation market cannot successfully emerge without access to transmission to wholesale markets.[52]

By effectively immunizing Edison from antitrust liability, the Ninth Circuit has eliminated antitrust pressure to compel Edison and other major utilities to grant reasonable transmission access. The result is to thwart the will of Congress, consistently enforced by this Court, to subject regulated electric utilities to the antitrust laws.

II.

CONTRARY TO THE NINTH CIRCUIT, PRO RATA SHARING OF TRANSMISSION LINES IS AN ACCEPTED METHOD OF QUANTIFYING REASONABLE TRANSMISSION ACCESS

The Ninth Circuit held that summary judgment on Vernon's Section 2 damage claims was proper because its damage study assumed that pro rata sharing of transmission ("relative size share") was an appropriate method for quantifying reasonable access and that assumption was erroneous as a matter of law thereby destroying Vernon's proof of any damages. The supposed flaw "resulted in [supposed] findings that . . . no damages had been properly shown," and "the deficiencies in that study undermine Vernon's whole case."[53] The district court was not "required to allow Vernon to go to the jury with its erroneous approach or give it another opportunity to refine a study that, according to Vernon, could not be refined. We think not."[54]

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[52]*FERC Transmission Task Force Report* (1989).

[53]*City of Vernon* 955 F.2d at 1371, App. at 19. The court erroneously discovered another "flaw" in the damage study because the study did not disaggregate damages attributable to § 1 and § 2 violations. Vernon was not required to disaggregate because the anticompetitive acts charged under § 1 are also violations of § 2 when a monopolist is acting alone. *Lorain Journal Co., supra*, 342 U.S. at 153-54; *Standard Oil of N.J., supra*, 221 U.S. at 61.

[54]*City of Vernon*, 955 F.2d at 1372, App. at 21.

The district court made no such findings with respect to Vernon's Section 2 claims, and summary judgment was not granted on that ground. The district court admitted the damage study over Edison's objections and granted summary judgment on the sole ground that Edison's claimed business justification was a complete defense.[55] Vernon could have readily "refined" the study in the district court if it had occasion to do so, but it had no such occasion. After the district court overruled Edison's objections and admitted the study on the Section 2 claims, Vernon had no reason to "revise" it. If the decision is not overturned, Vernon is foreclosed from ever trying its Section 2 damage case despite its *prima facie* proof of liability and its lack of any opportunity to overcome the Ninth Circuit's objections to the damage study.

Contrary to the opinion below, pro rata access is a method of measuring a shared resource in the electric utility industry accepted by regulatory agencies in issuing orders (affirmed by this Court) requiring such sharing, and "relative size share" is accepted by Edison itself as a proper pro rata measure of access.[56]

In *Terminal R.R.*, this Court compelled the owners of railroad bridges essential to competition in the relevant market to share those facilities with rival railroads on terms analogous to those hypothesized in Vernon's damage study. The Court ordered the owners to share the bridges "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane

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[55]Edison did not cross appeal claiming error in the admission of the study; nevertheless, the Court of Appeals permitted Edison to attack the study as if the study had been excluded.

[56]*E.g., Gainsville Utilities Dep't. v. Florida Power Corp.*, 402 U.S. 515 (1971) (affirming agency's interconnection order requiring pro rata reserve sharing); *Alabama Power Co. v. Nuclear Regulatory Comm'n*, 692 F.2d 1362, 1366 n. 2 (11th Cir. 1982), *aff'g* 13 N.R.C. 1027 (1981), *cert. denied*, 464 U.S. 816 (1983). Edison, Pacific Gas & Electric Co. and San Diego Gas & Electric Co. use the relative size share formulation to provide each other access to the Pacific Intertie. CR 179; ER 270-72.

as may be with respect to expenses and charges as that occupied by the proprietary companies." 224 U.S. at 411.

No authority supports the lower court's conclusion that pro rata sharing of an essential facility can be held unreasonable as a matter of law. To the contrary, other circuits have held that the reasonableness of the amount and terms of access are questions of fact for the jury.[57]

CONCLUSION

The decision below is a "frontal assault on the basic policy of the Sherman Act" in direct conflict with the decisions of this Court and of other circuits. If not overturned, the decision can seriously cripple competition in the electric utility industry which improves efficiency and results in lower prices for electricity for all consumers. Accordingly, petitioner requests the Court to grant certiorari to review the decision of the Ninth Circuit.

Dated: July 20, 1992.

Respectfully submitted,

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[57] *E.g., Delaware & Hudson R.R. Co., supra*, 902 F.2d at 179-80; *MCI Communications Corp., supra*, 708 F.2d at 1131-53.